No. 13677

United States Court of Appeals

For the Ninth Circuit

SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ,
Appellant,

vs.

JAMES McGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,
Appellees.

Appellant's Opening Brief

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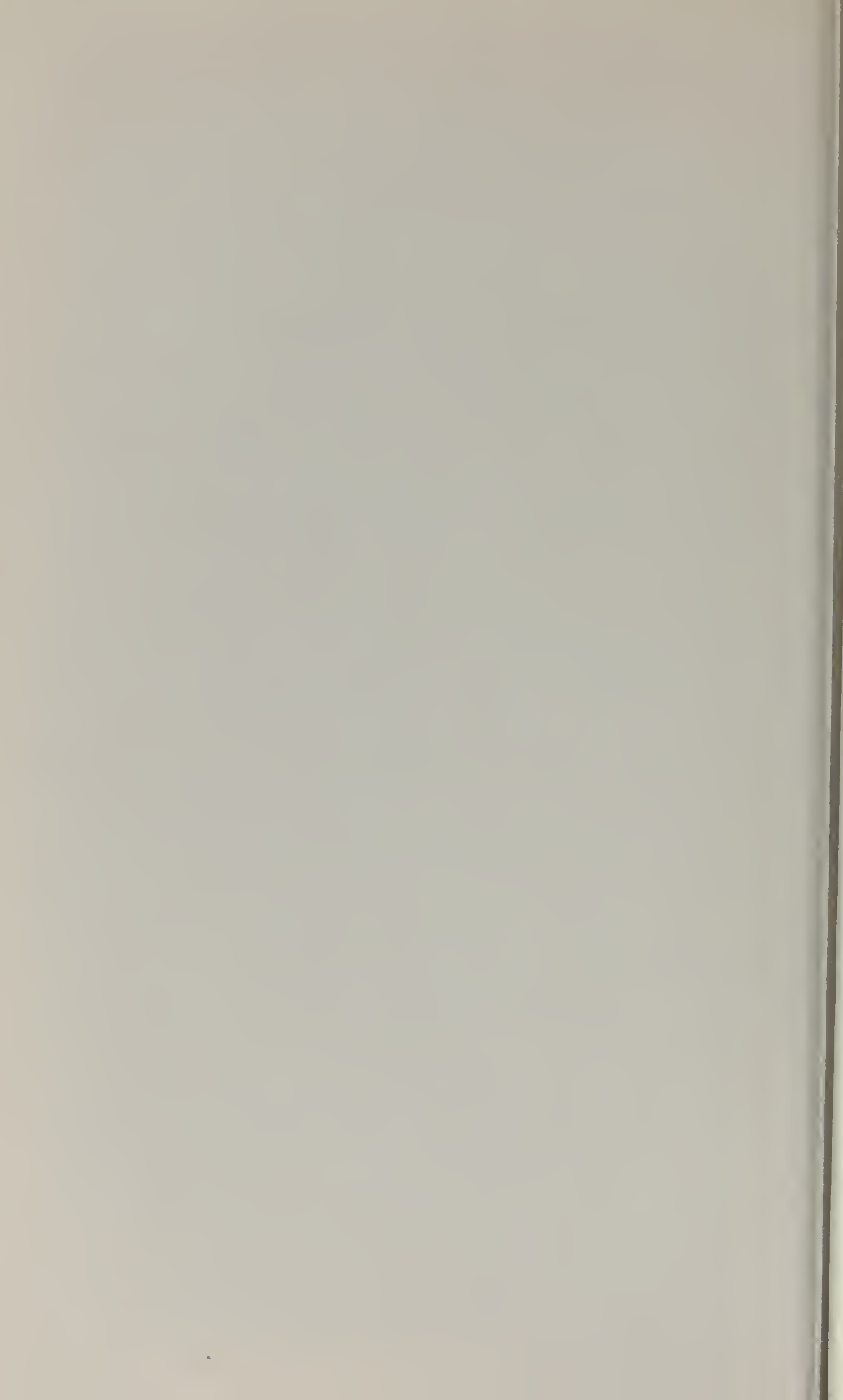

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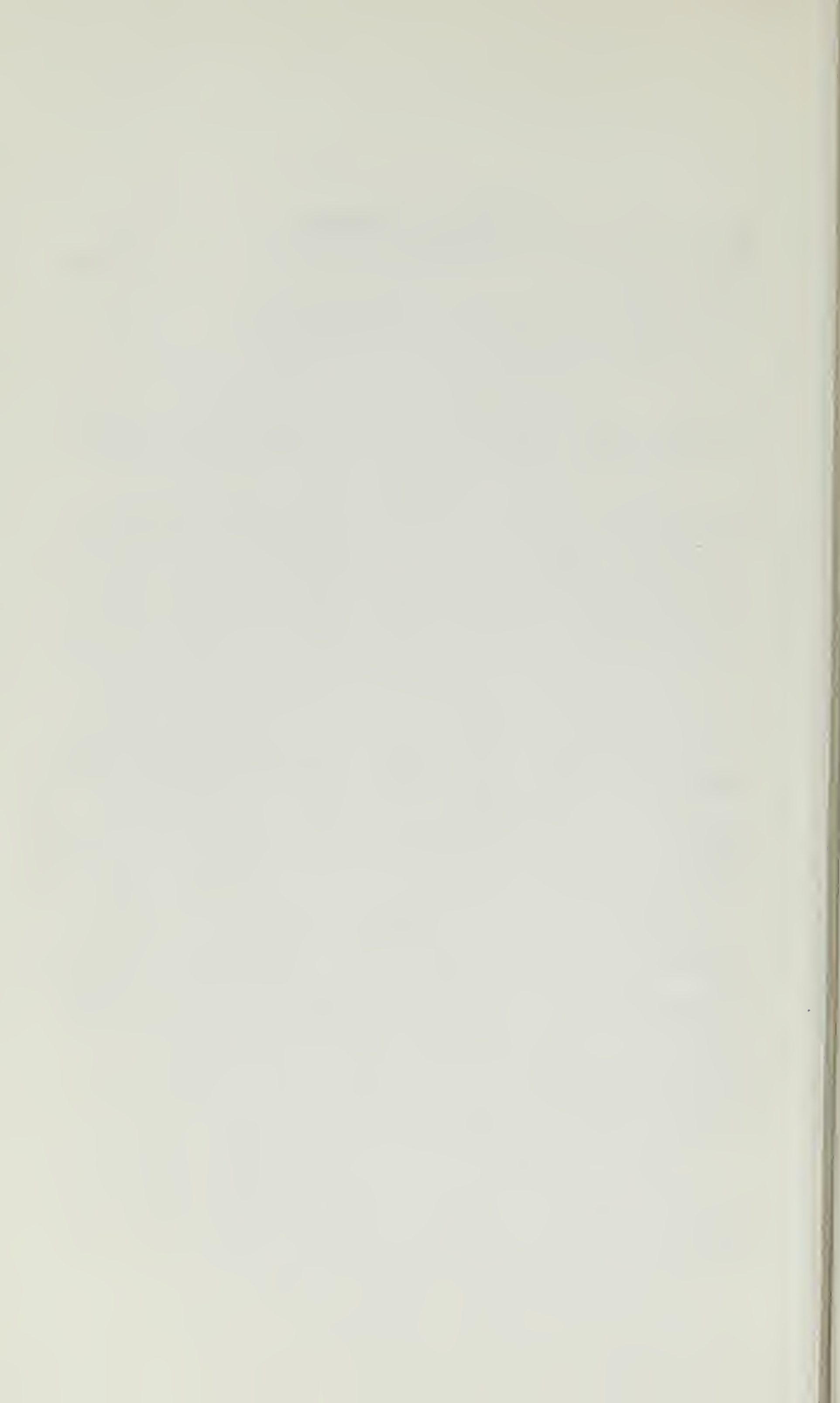

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Appellees.

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Appellant's Opening Brief

STATEMENT OF FACTS

Petitioner, a citizen of the Republic of Mexico, on September 27, 1947, was arrested under a warrant in deportation proceedings, charging that at the time of his entry on December 20, 1938, he was an immigrant not in possession of a valid immigration visa and not exempt from the presentation thereof by the act or regulations made thereunder. Hearings were conducted before the Service, and findings and conclusions were made and an order was entered which determined that the petitioner was (1) not ineligible

for naturalization; (2) that he was a person of good moral character, and (3) that he has resided in the United States continuously for the past 7 years and was residing in the United States on July 1, 1948, and that no evidence developed concerning his deportability under any of the grounds specified in section 19(d) of the Immigration Act of 1917. The Conclusions of Law determined that the petitioner met the statutory requirements for eligibility for suspension of deportation pursuant to section 19(c)(2)(b) of the Immigration Act of 1917, and that he meets the statutory requirement for eligibility for voluntary departure pursuant to section 19(c)(1) of the Immigration Act of 1917 as amended.

The hearing officer thereupon recommended that the petitioner be required to depart from the United States. The Immigration Board of Appeals affirmed the order requiring petitioner's departure. Thereafter a further petition was made to the Immigration Board of Appeals for a consideration of petitioner's right to suspension of deportation. The Board on October 19, 1951, ordered petitioner to depart from the United States with the proviso that deportation be effected if the alien did not avail himself of such required departure.

On July 2, 1952, the petitioner filed his action entitled "Petition for Judicial Review or Habeas Corpus", in which, in addition to alleging the foregoing he further recited that he had been a member of the

armed forces of the United States of America and received his honorable discharge from the Army of the United States on March 18, 1943 (R. 5); that he had been a resident of the United States continuously since the year 1938, and had registered under the Alien Registration Act of 1940. He further alleged that he applied for suspension of deportation on the grounds of seven years' continuous residence in the United States and residence on July 1, 1948, and of his continuous good moral character for a period of five years (R. 5-6).

The petition further recites the order of the Immigration Board of Appeals *that an order of deportation be not entered but that petitioner was required to depart from the United States,* and the further allegation that on the 19th day of October, 1951, the Board of Immigration Appeals entered an order requiring petitioner to depart from the United States.

Petitioner's complaint further recites that the hearings which resulted in the order requiring his departure were not held pursuant to the Administrative Procedure Act in full force and effect during the proceedings, in that pursuant to section 11 of said Act the hearing officer conducting the hearings was never duly, lawfully or regularly appointed pursuant to said Act, and therefore the hearings were conducted in violation of law (R. 5-9).

It further appears from the allegations of the petition that the Immigration Service in conducting said

hearings and in denying petitioner's request for suspension of deportation acted arbitrarily, capriciously and unwarranted and that the hearing officer in conducting the proceedings acted in violation of law (R. 9).

The allegations of the petition further recite that the actions of the Immigration Service were in violation of the rules and regulations of said Service and procedural due process of law (R. 9-11).

Judicial review was requested under section 10 of the Administrative Procedure Act (5 U. S. C. A. sec. 1009).

To the foregoing petition the respondent District Director appeared and moved for a dismissal on the grounds of "lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process and failure to join an indispensable party." (R. 14-15).

By memorandum decision of the District Court, respondent's petition to dismiss was granted and judgment of dismissal entered accordingly on the 31st day of October, 1952 (R. 21).

POINTS AND AUTHORITIES AND ARGUMENT

Petitioner seeks judicial review:

(1) of the processes and proceedings of the Immigration Service which resulted in an order for him to depart from the United States;

(2) of the denial of his application for suspension of deportation on the grounds that the actions of the Immigration Service were capricious, arbitrary, and unwarranted, and a denial of due process of law.

Petitioner contends that he is entitled to judicial review, as the Department did not direct his deportation from the United States and no outstanding order of deportation was entered against him.

This point comes squarely within the point raised in the case of *Jose Bustos-Ovalle v. H. R. Landon, District Director,* No. 13917, now before this Court for decision. This petitioner does stipulate that the ruling in the *Ovalle* case shall be binding upon him in the instant case on this point.

The memorandum decision of the District Court, after reciting the allegations of the petition and noting the grounds for dismissal by the respondent determined that:

> " . . . where the petitioner has alleged he was denied procedural due process of law which deprived him of the exercise of the Attorney Gen-

eral's discretion, he is entitled to a hearing and judicial determination of that question. This right is derived, not from the statute, but from the Fifth Amendment to the Constitution of the United States, which prohibits a deprivation of liberty or property without due process of law. *Bridges vs. Wixon,* (C. A. 9); 144 F. 2d 927.

"A decree requiring the Attorney General to exercise the discretion committed to him could only be effective if granted by a court with jurisdiction over his person. The Attorney General's residence is in the District of Columbia. This Court's process does not extend to the District of Columbia and it cannot require his attendance here. It, therefore, has no jurisdiction over his person. *Connor vs. Miller,* 178 F. 2d 755." (R. 18).

The Court then propounded the query, whether petitioner can proceed against the local District Director of Immigration, or whether the Attorney General is an indispensable party. The Court concluded that "The Attorney General alone is vested with the discretionary power to grant suspension of deportation, and a decree which expended itself on the District Director as the only respondent before the Court could not grant the relief the petitioner is seeking. It follows that the Attorney General is an indispensable party." (R. 18-20).

Petitioner contends that he is entitled to a judicial review to test the authority of the hearing officer to conduct the hearing; that the hearing officer's de-

nial of suspension of deportation and his order for petitioner's departure from the United States was erroneous, arbitrary, capricious and unwarranted, and subject to being review by judicial process. In order to subject a person to an order of deportation or departure, such orders presuppose a valid, lawful procedural due process hearing. We challenge the hearings as not having afforded the petitioner due process of law in the instant matter.

An order to depart or an order of deportation is not executed by the Attorney General of the United States, but by his subordinate officers. These subordinate officers are within the jurisdiction of the District Court and service of process was made upon the District Director at Los Angeles, who appeared in the action. While it is true that proceedings against the District Director would necessitate passing upon the validity of the order of the Board of Immigration Appeals directing voluntary departure from the United States, yet it is the District Director who must carry out the order. It is obvious that a subordinate officer is under command of his superior to do what the superior directs; yet such subordinate officer may be left under a command of his superior officer to do what the Court has forbidden him to do. This is immaterial. Appropos, if the Immigration Service had not afforded petitioner any hearing, but ordered his departure, which order was affirmed by the Immigration Board of Appeals, this process would obviously be an

unfair hearing and a denial of due process which the Court would have a right to review. The decree in review would expend itself upon the District Director, who exercises the power conferred upon him to effect petitioner's voluntary departure from the United States.

This matter comes squarely within the rule announced by the Supreme Court of the United States in *William vs. Fanning,* 332 U. S. 490, 92 L. Ed. 95.

The superior, in this instance, the Attorney General of the United States, is never an indispensable party to the action when the plaintiff attacks his authority to act or to issue the order or regulation complained of.

> *Colorado v. Toll,* 268 U. S. 228, 230; 69 L. Ed. 927, 45 S. Ct. 505;
> *Neher v. Harwood,* (9th Cir.) 128 F. 2d 846;
> *Varney v. Wareheime* (6th Cir.) 147 F. 2d 238, 242;
> *Greer v. Cline* (6th Cir.) 148 F. 2d 380.

On June 11, 1953, the U. S. Court of Appeals for the District of Columbia in *Rubenstein v. Brownell,* 206 F. 2d 449, determined that *Heikkila v. Barber,* 345 U. S. 229, had no application under the 1952 Immigration and Naturalization Act, but that orders of the Immigration Service were subject to review under the Administrative Procedure Act. On January 11, 1954, the Supreme Court of the United States granted certiorari

and affirmed the decision of the Court of Appeals. It has not been determined by any appellate court or Supreme Court of the United States that the Administrative Procedure Act does not apply to orders of the Immigration Department which grant voluntary departure and do not direct or enter an order of deportation. Petitioner contends that with respect to the order requiring him to depart from the United States without an order of deportation, even though such order was made prior to the 1952 Act, the Court has jurisdiction to hear and determine concerning the validity of the orders of the Immigration Service under the Administrative Procedure Act, section 10 (a, b, c, d and e).

The scope of the *Heikkila vs. Barber, supra,* opinion must be limited in its application to orders of deportation and has no effect upon or apply to orders of the Department that require departure from the United States without an order of deportation. The order of voluntary departure in this matter was determined by the officer within the jurisdiction of this court, whose superior, the District Director of Immigration, likewise was within the jurisdiction of this Court, upon whom process was effected.

WHEREFORE, petitioner respectfully requests that the judgment of the District Court be reversed.

Respectfully submitted,

DAVID C. MARCUS,
Attorney for Appellant.